the question of estoppel. An unconstitutional enactment of the legislature is not law; it is of no more force than if it never had been passed. Its passage is not the act of the legislature as an official enactment. No one is bound by it, nor is any one bound to notice it, The state is not estopped because her officers recognised it as valid, and rights of her citizens are acquired under it and through the acts of her officers: *Reid* v. *State ex rel. Thompson*, 74 Ind. 252.

We cannot regard this special act in any other light than a legislative license to violate the general law of the state. All the citizens of the state are forbidden to establish and run a lottery, but the legislature has seen fit to grant the privilege to this individual, Whips. He, above all others, enjoys a special favor. Suppose all the citizens of the state were permitted to establish and run a lottery except Whips. Would it be contended for a moment that the law was constitutional as to him? In that event the court would regard the entire act unconstitutional, or else the proviso forbidding Whips to engage in lottery schemes. The legislatures of the respective states are as supreme as Parliament in the highest pitch of its power, subject only to the Constitution of the United States and laws made in pursuance thereof, public treaties, and their own state constitutions; yet we very much doubt if even an attempt, previous to this one, has ever been made to exempt a citizen from the provision of the general criminal law of the state.

W. W. THORNTON.

Indianapolis, Ind.

Supreme Court of Pennsylvania.

BALTIMORE AND OHIO RAILROAD CO. *v.* SCHWINDLING.

Where an infant is upon the platform of a railroad station, not as a passenger or upon any business connected with the railroad company, the company owes him no duty. Hence, if he be injured by a passing train he cannot recover against the company for his injuries upon the theory that they have failed to discharge towards him a legal duty and hence have been guilty of negligence.

Semble, that in such case the company would only be liable for a wanton or intentional injury.

ERROR to the Common Pleas No. 1, of Allegheny county.

Case by William Schwindling, by his next friend Peter Schwindling, against the Baltimore and Ohio Railroad Co., to recover damages for an injury occasioned by the negligence of the company defendant.

On the trial, before COLLIER, J., the following facts appeared: On September 5th 1880, the plaintiff, a boy about five years of age, was run over by a train of cars of defendant at Osceola. On that afternoon, the plaintiff, who lived with his parents in one of a row of houses, built close along the line of the road, started to follow his older brothers, who had been sent by their mother to the store

across the defendant's track to make some purchases. He did not actually cross the track with them, but stopped at the platform connected with the defendant's station, where he was joined by his brothers on their return from the store. They with some other boys remained there some time, "to see the train come in," the plaintiff being on the edge of the platform, so close to the track that the iron step attached to one of the cars, which had been broken and twisted outwards so that it projected several inches beyond the side of the car, caught the plaintiff, and threw him under the cars, which passed over his leg, causing the injuries for which this suit was brought. The train was moving "very slowly" at the time of the accident. It was further shown, on the part of the plaintiff, that the people, young and old, living on opposite sides of the track, were in the habit of passing and repassing across the company's tracks; though there was no regular crossing at that place. On the part of the defendant, it was shown that none of the trainmen saw the boy until after he was hurt; and that the men in charge of the train were all at their places, attending to their duties. It was further shown, that at the time of the accident the boys, including the plaintiff, were playing about the platform, and as the train came along were amusing themselves by trying to jump on and off the moving cars.

Defendant requested the court to charge as follows: That under all the evidence in the case the verdict must be for the defendant. Refused. Verdict for plaintiff $2000 and judgment. The defendant thereupon took this writ, assigning for error, *inter alia*, the answer of the court to the defendant's points.

Geo. Shiras Jr., *John McCleave*, *Welty McCullough* and *Henry M. Hoyt, Jr.*, for plaintiff in error.

M. Swartzwelder and *Frank Thomson*, for defendant in error.

The opinion of the court was delivered by

GREEN, J.—At the time the plaintiff received his injury he was standing on the platform of the defendant, so close to its edge, that, according to the theory upon which the case was tried for the plaintiff, he was struck by a slight projection from the side of a passing freight car.

He was not a passenger, he had no business of any kind with the defendant, or any of its agents or employees; in fact, he was

a boy of five or six years of age, amusing himself looking at the moving train. He was not invited upon the platform by any agent of the defendant, and he was not engaged in the act of crossing either the track or the platform at the time of the accident. He was simply loitering upon the edge of the platform, with no other purpose or motive than his own personal enjoyment. His elder brother, his principal witness, testified that he told him to come back from where he was standing, but he refused to do so. A passing car, moving at a very slow rate of speed, not exceeding three or four miles an hour, with an iron step projecting a few inches from the side of the car (as alleged by the plaintiff, though denied by the defendant), struck him and pulled him from the platform under the wheels of the car, so that he was run over and injured. In these circumstances was there any right of recovery? We think clearly not. We held, in the case of *Gillis* v. *Pennsylvania Railroad Co.*, 9 P. F. Smith 141, that "the platform of a railroad company at its station or stopping-place, is in no sense a public highway; there is no dedication to public use as such; it is a structure erected expressly for the accommodation of passengers arriving and departing in the train. Being unenclosed, persons are allowed the privilege of walking over it for other purposes, but they have no right to do so. * * * Still, even a trespasser on the land of another can maintain an action for a wanton or intentional injury inflicted on him by the owner." Again, on p. 143: "The plaintiff may not have been technically a trespasser; the platform was open; there was general license to pass over it; but he was where he had no legal right to be; his presence there was in no way connected with the purposes for which the platform was constructed. * * * As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand on it; as to all others they were liable only for wanton or intentional injury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendant had nothing to do with that." Upon the foregoing principles, and upon the authority of many adjudicated cases cited in the opinion, and which it is therefore not necessary to review here, it was held there could be no recovery, although the platform was insufficient to bear the weight of the persons who were upon it. It was conceded that there would have been a right to recover if

the persons on the platform had been there as passengers, or upon business connected with the defendant.

In the latter case there would have been a violation of a duty owing by the defendant to the plaintiff. But there was no such duty because of the absence of the relation, and hence there was no right of action. The controlling feature of the inquiry in all such cases is, what was the duty which was violated by the defendant. If there was none, there is no legal liability; this was essentially the distinction on which *Railroad* v. *Hummell*, 8 Wright 375, was decided. On p. 379, STRONG, J., said: "Yet a jury cannot hold parties to a higher standard of care than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precautions against such acts, then the jury cannot say that a failure to take such precautions, is a failure in duty, and negligence." * * * "Blowing the whistle of the locomotive, or making any other signal, was not a duty owed to the persons in the neighborhood, and consequently the fact that the whistle was not blown nor a signal made was no evidence of negligence."

It will be perceived that it is entirely immaterial, in solving this question, whether the person injured is an adult or a child.

There is no question of contributory negligence involved in the inquiry or essential to its consideration. If the defendant did not owe the duty of protection against the injury suffered in the particular case, the omission to furnish such protection is not negligence, and there is no liability on that ground. Take the present case as an illustration. The only duty which is or can be claimed as having been violated was a duty to protect the plaintiff, when standing upon the edge of the defendant's platform, from injury from a car-step projecting a few inches beyond the side of a slowly passing car. But how can any such duty arise out of such circumstances. The plaintiff had no right to place himself in the position in which it was possible for him to be injured in such a manner, and the defendant was not bound to take precaution against such injury. It is not denied that this would be true if the plaintiff was an adult; how then can it be otherwise than true as to a child? The absence of duty is precisely the same in either case, and the consequent absence of liability must be the same in both. It is

quite true that young children can recover for injuries in circumstances in which adults cannot. But even children cannot recover unless there is negligence, and there can be no negligence without a breach of duty.

In *Kay* v. *Pennsylvania Railroad Co.*, 15 P. F. Smith 276, we said: "If there be no negligence on the part of the company, then the incapacity of the child creates no liability, and its injury is its own misfortune which it must bear."

In *Philadelphia and Reading Railroad Co.* v. *Spearen*, 11 Wright 300, where a child five years old suddenly ran across the track in front of an approaching engine, and was struck and injured, we said on page 303: "The engine in this case having safely passed the crossing appropriated to travellers, the engineer was under no duty to suppose any one would attempt to cross the track suddenly right in front of the engine. He had a right to suppose a clear track, and was not guilty in failing to use precaution where he had no reason to expect interruption." In *Hargraves* v. *Deacon*, 25 Mich. 1, the court said: "The plaintiff being a child of tender years, we have found no support for any rule which would protect those (child or adult) who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant." In *Morrissey* v. *Eastern Railroad Co.*, 126 Mass. 377, the action was brought by a child four years of age, who was injured while playing upon the track of the defendant.

The court said: "The plaintiff at the time of the accident was a mere intruder and trespasser upon the railroad track. No inducement or implied invitation to him to enter upon it had been held out. He was neither a passenger, nor on his way to become one, but was there merely for his own amusement, and was using the track for a play-ground. The defendant corporation owed him no duty, except the negative one, not maliciously or with gross and reckless carelessness to run over him."

In *Gillespie* v. *McGowan*, 39 Leg. Int. 313, we held that the owners of unenclosed lots in Philadelphia owed no duty of protection, even to children, against the danger of falling into an open well on the premises, although the field in question was crossed by frequented paths and used as a place of resort by children and adults.

In *Moore* v. *Philadelphia and Reading Railroad Co.*, 39 Leg.

Int. 290, we held there could be no recovery for the death of a boy ten years of age who was struck by an engine while walking on and along the track, on the end of the cross-ties. We said: "The circumstance that the trespasser in this instance was a boy ten years of age cannot affect the application of the rule. The defendant owed him no greater duty than if he had been an adult."

In the case of *Philadelphia and Reading Railroad Co.* v. *Heil*, 5 Weekly Notes 91, a child four years of age was struck, as it was claimed, by the projecting axle-box of a car, which extended one foot six inches beyond the outside of the rail and three inches over the line of the street curb. He was on the public street-walk, where he had a right to be, but he was so close to the car that he was struck, as was supposed, by the projecting axle. We held that there was no sufficient evidence of negligence in these circumstances to submit the case to a jury. The cases of injuries to persons while crossing the track at permissive crossings are not analogous, and have no application. When the right to cross at a particular place is established, by permission or otherwise, the duty of ordinary care is incumbent upon the company. But, in the present case, the plaintiff was not engaged in the act of crossing the track, or even the platform, when he was injured, and therefore the cases on this subject are not in point. Upon the whole case, we discern no evidence of any breach of duty owing by the defendant to the plaintiff. There was no pretence of wanton injury, and therefore the first and second points of the defendant should have been affirmed.

Judgment reversed.

The right of a child to recover for injuries incurred while trespassing, in light of the principal case and the recent decisions in New York and in England, is by no means clear. Mistakes may readily arise by confounding cases of this kind with those where the parents of the child sue for injuries, and the contributory negligence of the parents becomes an element: *Waite* v. *Railway Co.*, E., B. & E. 719; *Schmidt* v. *Railroad Co.*, 23 Wis. 186; *Meeks* v. *Railroad Co.*, 52 Cal. 602; *Smith* v. *Railway Co.*, 92 Penn. St. 450; and those in which the child has done other acts negligent in themselves, which contribute directly to the injury: *Gardner* v. *Grace*, 1 Fost. & Fin. 352; *Hughes* v. *Macfie*, 2 H. & C. 744; *Chicago* v. *Starr*, 42 Ill. 174; *Railway Co.* v. *Connell*, 88 Penn. St. 520; the line of cases of which *Bird* v. *Holbrook*, 4 Bing. 628, is generally considered the leading case, does not affect the question, because they are cases of gross negligence. The right of a child to recover is dependent upon some negligence of the party upon whose property he trespasses; for if there be no negligence no blame can arise upon which to found an action: *Singleton* v. *Railway Co.*, 7 C. B. (N. S.) 287; *Hartfield* v. *Roper*, 21 Wend. 615; *Railroad Co.* v.

Hummell, 44 Penna. St. 375; *Chester* v. *Porter*, 47 Ill. 66; *Manly* v. *Railroad Co.*, 74 N. C. 655; *Bulger* v. *Railroad Co.*, 56 Ind. 396; *Morrissey* v. *Railroad Co.*, 126 Mass. 377; *Hicks* v. *Railroad Co.*, 64 Mo. 430; but even upon a question as plain apparently as this, doubt seems to have been cast in the case of *Lygo* v. *Newbold*, 9 Exch. 302, ALDERSON, J., says, "It seems strange that a person who rides in his carriage without a servant, if a child receives an injury by getting up behind, for the purpose of having a ride, should be liable for the injury," evidently imagining that the rule which had been laid down in the leading case of *Lynch* v. *Nurdin*, gave a trespassing child a right to recover for injuries in *any event*, and POLLOCK, C. B., in delivering judgment in the same case, says, "The case last put raises a doubt as to the authority of *Lynch* v. *Nurdin*, if it be applicable to the case where a child receives an injury from indulging in what is called 'the natural instinct of a child,' by getting up behind a gentleman's carriage, there being no servant there;" so in a very late case in Pennsylvania, *Gillespie* v. *McGowan*, 12 Weekly Notes 413, PAXSON, J., says, "It is part of a boy's nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity if carried to its logical conclusion."

There is no doubt that a dangerous employment, such as the manufacture of gunpowder and explosives, the running of railroads and others equally dangerous, may be carried on with no right upon the part of the public, adult or infant, to recover for injuries if carried on with all possible care at proper places and without negligence; nor is there any doubt that adults can recover where injured by gross negligence or wantonness, even though the injury happen while they are trespassing upon the private enclosures of others who owe no apparent duty to the world at large save that established by the courts in the maxim *sic utere tuo, ut alienum non lædas;* certainly, therefore, in cases of gross negligence or wantonness, such as setting traps, spring guns, &c., a child could recover, as well as an adult, on the ground of the general duty owed all alike. Now it seems much more just that as a child is much weaker and more likely, from its inexperience to gratify its instincts of curiosity, that a greater degree of care should be required towards them than towards adults, and that where no positive negligence can be fixed upon the child, save that arising from what has been well called "the natural instinct of a child," that it would not be going too far to say that every negligence amounts to a breach of duty towards them. Mr. Thompson, in his book on Negligence, says, vol. 2, p. 1183, n. 3, "It is important to bear in mind, in actions for injuries to children, a very simple and fundamental fact which, in this class of cases is sometimes strangely lost sight of, viz.: that no action arises without a breach of duty. It is doubtless true that the public are held to a higher degree of care towards children than adults, and that children of tender years are incapable of negligence; but from these facts it must not be hastily concluded that an action can be maintained in every case of injury."

For the purposes of this article I will only discuss cases where the action was instituted by the child through his next friend to recover for injuries happening to him while trespassing, leaving out, so far as is possible, all cases where other acts of the child, besides the trespass, contributed directly to the injury and all cases of contributory negligence of the parents where they sue.

The leading case is *Lynch* v. *Nurdin*, 1 Q. B. 29, decided in 1841, by DEN-

MAN, while chief justice of the Queen's Bench, in England. It arose as follows: Upon the day of the accident, defendant's carman left his horse and car standing in the street alone for one-half hour, while he went into a house; plaintiff, a boy under seven, climbed upon the wagon, and another boy started the horse, when plaintiff, attempting to get off the shaft, fell and was run over by the wheel and his leg broken; WILLIAMS, J., left it to the jury to say whether it was negligence in the defendant's servant to leave the horse and cart, and also whether that negligence occasioned the accident. They, answering the points in the affirmative, found a verdict for the plaintiff. On motion for a new trial, DENMAN, C. J., delivering the opinion, says: "But the question remains, can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse: then, we think, that defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it."

This case seems to have been concurred in for some years. In 1854, in *Lygo* v. *Newbold*, *supra*, Baron PARKE said, during the argument, "the decision in *Lynch* v. *Nurdin*, proceeded wholly upon the ground that the plaintiff had taken as much care as could be expected from a child of tender years—in short, that the plaintiff was blameless, and consequently that the act of the plaintiff did not affect the question," while ALDERSON, B., and POLLOCK, C. B., although they did not say the case was wrongly decided, questioned it and seemed to think it might be carried too far. (See the remark of MARTIN, B., in *Waite* v. *Railway Co.*, E., B. & E. 729.) In 1863, two cases were heard together before the Court of Exchequer: *Hughes* v. *Macfie*, and *Abbott* v. *Macfie*, 2 H. & C. 744; they arose out of the same state of facts: The defendants were sugar refiners, the cellar of their warehouse extended under the street and opened into it. The opening when not required to receive or discharge casks was covered by a large wooden flap or lid, with three cross bars on its lower face, fitting into stone grooves which formed its support. On the day of the accident the defendant's workmen had removed the flap and having reared it against the wall nearly upright, with its lower face towards the street, had gone away. The plaintiff, Abbott, a child of seven years old, was playing in the street, when a child of five years Hughes (the plaintiff), got upon the cross bars of the flap, and in jumping down caught some part of the flap with his jacket and pulled it over upon himself and the other plaintiff. In *Hughes* and *Macfie*, the case of the boy who caused the accident, POLLOCK, C. B., delivering the opinion sustaining the nonsuit, says: "In the case in which Hughes was the plaintiff, the flap was pulled over by the plaintiff, a child of tender years, by playing on it and jumping from it, when it fell upon him and hurt him severely. Had he been an adult it is clear he could have maintained no action. He would voluntarily have meddled for no lawful purpose with that which if left alone would not have hurt him. He would therefore, at all events, have contributed by his own negligence to his damage. We think the fact of the plaintiff being of tender years makes no difference. His touching was for no lawful

purpose, and if he could maintain the action he could equally do so if the flap had been placed inside the defendant's premises within sight and reach of the child."

"As to the other action in which Abbott was plaintiff, the case is different. If he was playing with Hughes, so as to be a joint actor with him, he cannot maintain this action. If not, we think he can, as his injuries would then be the result of the joint negligence of Hughes and the defendant."

These cases do not apparently rest upon the ground of the child's being a trespasser; but upon his contributory negligence; they are also predicated upon negligence in the defendant, for the second case was sent back for a retrial, at which the jury found for the defendant. No report is preserved of this new trial, so it cannot be discovered whether for contributory negligence of the child or lack of negligence of the defendant. It might be well to note that POLLOCK, C. B., who delivered the opinion in *Lygo* v. *Newbold*, also delivered this opinion.

Before the same court, in 1866, arose the case of *Mangan* v. *Atterton*, 1 H. & C. 388, where defendant exposed, at Litchfield, in the public street or market, without an attendant, a crushing machine having on one side a set of cog wheels to work the rollers, and on the other side a handle by which the wheels were set in motion. The plaintiff, a boy, four years old, accompanied by his brother, seven years of age, and other boys, coming upon this machine on their way to school, stopped; one boy turned the handle while the plaintiff put his fingers in the cogs and three were crushed so severely that they had to be amputated. The judge instructed the jury if they thought the machine dangerous to find for the plaintiff, which they accordingly did. On motion, a new trial was granted by the court in banc. MARTIN, B.: "Whatever negligence there may have been in leaving the machine in such a condition as to afford the boy an opportunity of turning the handle, it is far too remote to render the defendant liable for the injury done to the plaintiff. In my opinion the judge ought to have told the jury that there was no negligence on the part of the defendant." BRAMWELL, B., "Suppose he had painted it with some poisonous paint, and the child had sucked it, would he have been liable? In my opinion he had a perfect right to exhibit his machine in the market place, and he is not liable for injury caused by the plaintiff and his companion improperly meddling with it." I take it this case simply decides that there was no negligence on the part of defendant, so that no matter how blameless the child might have been no action could lie, and however we may disagree with the court as to that fact, the case in no way impairs the rule of law laid down in *Lynch* v. *Nurdin*.

In *Clark* v. *Chambers*, L. R., 3 Q. B. Div. 327–339, decided in 1878, a case of negligence brought by an adult for injuries, COCKBURN, C. J., delivering the opinion of the court and speaking of *Mangan* v. *Atterton*, says: "It appears to us that a man who leaves, in a public place, along which persons, and among them children, have to pass, a dangerous machine which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

In 1874, the Court of Exchequer, in the case of *Williams* v. *The Great Western Railway Co.*, L. R., 9 Exch. 157, again considered the right of a child to recover damages for negligence although a trespasser. The plaintiff, a child four and a half years old, was found lying on the rails of defendant's road by a foot-

path, with one foot severed from his body. The company had not fenced their road for 300 feet at a crossing near by, nor was it fenced at this point, although required so to be by law. The whole court (POLLOCK being one of the judges) held that the child might recover, although evidently a trespasser.

It would seem therefore that although there has been some dissent to the case of *Lynch* v. *Nurdin*, the weight of authority in England sustains it. The only case whose judgment directly impairs its authority being *Hughes* v. *Macfie*, where it was cited in argument but not mentioned in the opinion. The intemperate language in the cases of *Lygo* v. *Newbold* and *Mangan* v. *Atterton* may well be considered overbalanced by the weight of such authorities as Chief Justices DENMAN, COCKBURN and Chief Baron KELLY.

There is a ground upon which all of these cases may be considered as unconflicting and sound, which is, that although a child may recover, if a trespasser, for injuries occasioned by negligence, yet if besides trespassing the child contribute directly by its own action to the injury, even if there is negligence, then he cannot recover. If this be the rule which is to be read between the lines of *Hughes* v. *Macfie* and *Mangan* v. *Atterton*, then they are perfectly reconcilable with *Lynch* v. *Nurdin*.

Perhaps the earliest and most frequently quoted decision in the United States is *Birge* v. *Gardiner*, 19 Conn. 507, in 1849, where a child between six and seven, playing upon the lane on which his parents resided, took hold of a gate upon defendant's land, shook it and thereby occasioned it to fall and injure him. The negligence of which it was alleged the defendant was guilty, was knowingly permitting the gate to be insecure. No question of trespass was spoken of by the judge in the court below, who submitted the case to the jury in these words: "In determining this question it was proper for, and the duty of the jury to, take into consideration the age and condition of the plaintiff; whether his conduct was the result of any fault or negligence on his part, and whether it was not the result of childish instinct and thoughtlessness." This was upheld in the Supreme Court, Chief Justice CHURCH saying: "It might, perhaps, have been going too far for the court to have said, as a matter of law, that a child of this age could not be so blameworthy as to excuse the defendant. We will not say that such cases may not be imagined, or may not sometimes occur. But it was favorable to the defendant, and he cannot complain of it that the age and condition of the plaintiff, connected with the circumstances of the case, were put to the jury for them to determine what degree of fault, if any, was imputable to the plaintiff." *Lynch* v. *Nurdin* was cited and relied on. The court expressly say, however, that they do not decide whether the plaintiff was a trespasser or not. Yet in 1858, in *Daley* v. *Railroad Co.*, 26 Conn. 591, where a child of three trespassing upon a railroad was injured through the negligence of the railroad company, a case elaborately considered, they permit a recovery by the child, although the parent was so negligent that he himself could not have recovered, citing and relying on both *Lynch* v. *Nurdin* and *Birge* v. *Gardiner*. In *Robinson* v. *Cone*, 22 Vt. 213 (1850), the Supreme Court of Vermont arrived at the same conclusion as the Connecticut court in *Birge* v. *Gardiner*, again relying on *Lynch* v. *Nurdin* as settling the law. In 1858 an important case bearing upon this question was decided by the Supreme Court of Tennessee: *Whirley* v. *Whiteman*, 1 Head. 610. The facts are very similar to *Mangan* v. *Atterton*, but a different conclusion is reached from them. The defendants, owners of a paper-mill, connected with the mill, machinery that had been constructed to draw up wood from

a river on a truck; outside of the wall of the mill some eight or ten inches was fixed a cog-wheel, about twenty-six inches in diameter, which was geared into another cog-wheel for the purpose of moving the truck. These cogs were about twenty feet from the street, in an open space, entirely exposed without any cover, guard or enclosure whatever. The plaintiff, a child of three and one-half, was caught and injured, while the engineer was away and the wheels were running, so that his leg had to be amputated. The proof showed that the wheels might have been boxed at a trifling expense. A verdict was found for the defendant, which the Supreme Court reversed on the ground that it was the duty of the court to have instructed the jury specifically, as a matter of law, that the facts stated, if true, constituted that degree of negligence which would render the defendants liable in damages, and this notwithstanding the child was a trespasser.

The Supreme Court of the United States passed upon this question in 1873, in *Railroad Co.* v. *Stout*, 17 Wall. 657. There a railroad had upon its own land, near two roads in a hamlet of about 150 persons, an unenclosed turntable, revolving easily on its axis, unguarded and unlocked, the latch being broken. The plaintiff, a child of six years of age, without the knowledge of his parents, set off, with two boys, one nine and the other ten, with no definite purpose. It was proposed by one of them to go to the turntable to play; on arriving there, two of them began to turn the table, and plaintiff's foot was caught and crushed in attempting to get upon it. The defendants disclaimed negligence on the part of plaintiff. The question of the negligence of the railroad company was left to the jury, who returned a verdict for plaintiff, which the Supreme Court affirmed, citing and relying upon *Lynch* v. *Nurdin*, among other cases.

In *Keffe* v. *Railroad Co.*, 21 Minn. 207, and *Koons* v. *Railroad Co.*, 65 Mo. 592, both of which were cases of children being caught in turntables which were out of order, while trespassing, under circumstances almost identical with *Railroad Co.* v. *Stout*, the companies were held liable, and verdicts for the plaintiff were sustained.

In New York, the recent cases conflict. *Mangan* v. *Brooklyn Railroad Co.*, 38 N. Y. (Court of Appeals) 455, arose in 1868. Plaintiff sued for injuries caused by having been run over by defendant's car; he was between three and four years of age when left by his sister alone on a balcony in the rear of his father's house; the only mode by which he could get to the street was through an open window, four feet from the ground; he got to the street and passed in front of the mules drawing defendant's car, but was struck by the dash board, knocked down and received the injury for which suit was brought; it was in evidence that the driver of the car had caught a pigeon, which he had in his hands, having wound his lines around the brake, and was paying no attention. The court below granted a nonsuit which, on appeal, was reversed.

In *Mullaney* v. *Spence*, 15 Abb. Pr. 319 (1874), where a child, four years and six months old, was injured while trespassing on an elevator, operated by defendant, close to the street, which had been negligently left open and unguarded; the court again reiterated the doctrine of *Lynch* v. *Nurdin*, and *Mangan* v. *Railroad Co.*, and held that the question of the parent's negligence should have been sent to the jury.

In *McAlpin* v. *Powell*, 55 How. Pr. 163, in 1878, however, where a bright boy, ten years of age, stepped on a fire escape, required to be kept in repair by statute, where he had no business to be, and passed to the end, where there was a trap door, which gave way and precipitated him to the ground, killing him, the Court of Appeals held that the de-

fendant owed no duty to plaintiff, he being a trespasser, following *Hughes* v. *Macfie*, and *Mangan* v. *Atterton*, and distinguishing *Lynch* v. *Nurdin*, on the ground that there the child was attracted to the place where the accident happened by the blamable negligence of the defendant—MILLER, J., saying: "A child is permitted to go into the public streets, which are open to persons of all ages, without being chargeable with negligence, and being there, if led by attraction into danger, even although it may be that under the circumstances an action would lie for injuries occasioned thereby, such a case has no similarity to one where the child is left without any one to take especial charge of him, and escapes through an open unguarded window to a place of danger, and sustains an injury without any allurements being held out to him. A wide distinction exists between the two cases, and while the one at bar is on the border line, and the point of difference is perhaps very close, this distinction is fully recognised in the best considered adjudications in the courts, and is the turning point upon which cases of this character are to be determined."

The cases selected as a basis for this conclusion do not at all sustain it; for instance, *Mangan* v. *Atterton*, cited and relied on, was clearly a case where attractions were held out to children in the shape of a crank to turn; *Hughes* and *Macfie* was a case of contributory negligence, and the balance are cases either where there was no negligence or they were actions brought by adults from whom more care is required.

The first reference to this doctrine in Pennsylvania is to be found in the opinion of WOODWARD, J., in *Rauch* v. *Lloyd*, 31 Penn. St. 370, where he cites *Lynch* v. *Nurdin*, and *Robinson* v. *Cone*, and states that the preponderance of both reason and authority is favorable to them.

In *Railroad Co.* v. *Spearen*, 47 Penn. St. 304, AGNEW, J., says: "It would be a hard rule that would hold a child of five years of age to the same measure of care and diligence in avoiding the consequences of the neglect or unlawful acts of others which is required of adults. There is authority for this, *Rauch* v. *Lloyd*;" also *Lynch* v. *Nurdin*, and further, "If an adult should place himself upon the railroad where he has no right to be, but where the company is entitled to a clear track, and the benefit of the presumption that it will not be obstructed, and should be run down, the company would be liable only for wilful injury or its counterpart, gross negligence. But if a child of tender years should do so and suffer injury, the company would be liable for the want of ordinary care. The principle may be illustrated thus: If the engineer saw the adult in time to stop his train, but the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption that the trespasser would remove from it in time to avoid the danger, or if he thought the person did not notice the approaching train, it would be sufficient to whistle to attract his attention without stopping. But if instead of the adult it were a little child upon the track, it would be the duty of the engineer to stop his train upon seeing it. In the former case the adult concurring in the negligence causing the disaster, is without remedy, in the latter the child not concurring, from a want of capacity, the want of ordinary care in the engineer would create liability." In *Smith* v. *O'Connor*, 48 Penn. St. 218, the same cases are cited with approval.

In *Railroad Co.* v. *Mahoney*, 57 Penn. St. 187, the plaintiff, a child of four, was injured while in the arms of her aunt, who was trying to rescue her while trespassing upon the railroad track; the court, though denying the right of the representatives of the aunt to recover for her death, supported a judgment for the injuries inflicted upon the child, the

engineer of the company being negligent. So, also, in *Kay* v. *Railroad Co.*, 65 Penn. St. 269, where a child trespassed upon the land of the railroad company, and was injured by a car, permitted to run down a grade and around a curve without attendance, the court said the question had been settled in that state, citing the above cases and *Lynch* v. *Nurdin*. So, again, in the case of *Hydraulic Works* v. *Orr*, 83 Penn. St. 332, several children strayed into a private alley, ten feet wide, alongside of and upon the property of the Hydraulic works, and usually shut off from the public street by gates which, however, were open, at the time of the accident. While there the child of plaintiff was killed by the falling of a platform, weighing 800 pounds, about twenty feet up the alley, used to receive goods, and when not in use thrown back against the house wall on hinges upon which it moved. This platform was only kept in its place by its slight inclination against the wall and was liable to be tilted over whenever touched. The verdict for the plaintiff was sustained on the ground that some duty was owed the child although a trespasser.

The court, however, made a departure from their rule as originally laid down in *Railroad Co.* v. *Spearen*, in the case of *Cauley* v. *Railroad Co.*, 95 Penn. St. 398, in 1880, where on trial it was offered to prove that the plaintiff, a boy of seven years, was playing on a sand laden car standing on a switch, the train was moved and while in motion the conductor ordered him off; in jumping he fell under the wheels and was injured; also that a brakeman approached the boy in a threatening manner immediately before he jumped off. The court refused this evidence on the ground that the boy was a trespasser and that the company owed him no duty, and entered a nonsuit. The Supreme Court sustained this ruling, saying: "It is sufficient to say that the child being unlawfully upon the car, the defendant company owed it no duty and is not liable for the injury." This case was followed by *Gillespie* v. *McGowan*, 12 Weekly Notes 413, where the court say: "*Hydraulic Works* v. *Orr*, is authority only for its own facts. It was not intended to assert the doctrine that 'a child cannot be treated as a trespasser or wrongdoer,' and so far as it appears to sanction such a principle it must be considered as overruled." And the principal case may be considered as reaffirming the doctrine that no duty is owed to a trespasser, even though of tender years.

With all deference to such courts as the Court of Appeals in New York, and the Supreme Court of Pennsylvania, it would seem, upon a careful examination of all the cases, that these courts are in conflict with the weight of authority both in the United States and England, and that the last decisions in those two states are an entire departure from the rules laid down in the earlier cases of those states, and the reason that would relieve a railroad company from the result of its own negligence in injuring a little child straying upon its station which offers an invitation to all the world to enter is at least rather difficult to understand.

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